

# Exhibit 2



UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

NETLIST INC.,

a Delaware corporation,

Plaintiff-Appellee,

vs.

Case No.: 22-55209

SAMSUNG ELECTRONICS CO., LTD.,

a Korean corporation,

Defendant-Appellant.

TRANSCRIPT OF AUDIO-RECORDED ORAL ARGUMENT

Before: M. SMITH and DESAI, Circuit Judges, and AMON,  
District Judge

June 8, 2023

1:36 p.m.

Transcribed By:


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<p>1 to be your position that it's ambiguous and that it should</p> <p>2 be a jury trial on the meaning of it or do you say it</p> <p>3 clearly states your position and it should be read to</p> <p>4 apply only to the JDP?</p> <p>5 MR. YODER: Yes, Your Honor.</p> <p>6 Our position is that it is unambiguous, when the</p> <p>7 contract is read as a whole and when the apparent purpose</p> <p>8 of the contract is considered and the structure of the</p> <p>9 contract is considered along with the text.</p> <p>10 JUSTICE DESAI: So is it your position that</p> <p>11 Samsung never had any supply obligation under the</p> <p>12 agreement, based on the language I think that you cite</p> <p>13 that says 6.2 imposed a supply obligation if the joint</p> <p>14 development product ever, quote, became commercialized?</p> <p>15 MR. YODER: Well, let me just finish answering</p> <p>16 the first question, though, and that is, but in the</p> <p>17 alternative there is no question but that this agreement</p> <p>18 is reasonably susceptible to both proffered</p> <p>19 interpretations; whether the scope is limited to the joint</p> <p>20 development project or unlimited as Netlist contends.</p> <p>21 JUSTICE AMON: But then what happens if we</p> <p>22 determine it's ambiguous?</p> <p>23 Does it go back for a jury trial?</p> <p>24 MR. YODER: Well, it's a good question and as</p> <p>25 Your Honor probably knows, courts handle that issue quite</p> <p style="text-align: right;">Page 6</p>	<p>1 sell the product.</p> <p>2 JUSTICE AMON: But on the first point that you</p> <p>3 make, are you asking us to insert language after the word</p> <p>4 "products" that says in connection with the JDP?</p> <p>5 I mean that language is nowhere in 6.2.</p> <p>6 There's no language that ties it to the JDP, and</p> <p>7 there are other provisions in the contract that stand</p> <p>8 alone, separate and apart, from the JDP.</p> <p>9 So how would we resolve this, you know, what you</p> <p>10 claim to be an ambiguity or maybe you say it's clear in</p> <p>11 the other direction, without the specific language that I</p> <p>12 think you need in that section that ties it to the JDP.</p> <p>13 MR. YODER: Well, there is no language in 6.1</p> <p>14 either that says NVDIMM-P controller in connection with</p> <p>15 the joint development project.</p> <p>16 There's other provisions in the contract that</p> <p>17 clearly relate to the joint development project, that</p> <p>18 don't also say in connection with the joint development</p> <p>19 project. That's why you have to look at the structure of</p> <p>20 the agreement in order to interpret specific language.</p> <p>21 For example, in Section 3.1, there's an</p> <p>22 \$8 million NRE fee that's paid. It's clearly for the</p> <p>23 joint development project, but it doesn't say it's</p> <p>24 specifically for the joint development project.</p> <p>25 JUSTICE SMITH: Counsel, let's argue window,</p> <p style="text-align: right;">Page 8</p>
<p>1 differently, in terms of whether the issue just is</p> <p>2 presented to the jury as to whether there's a breach and</p> <p>3 then there's argument, whether the court gives fact</p> <p>4 questions to the jury to answer as to the disputed</p> <p>5 evidence.</p> <p>6 JUSTICE AMON: Does the damages verdict continue</p> <p>7 to remain or do they have to redo damages in light of</p> <p>8 that?</p> <p>9 MR. YODER: I think it would depend on the nature</p> <p>10 of the issue that would be remanded.</p> <p>11 I think that under a certain scenario the damages</p> <p>12 wouldn't change but under a different scenario it would,</p> <p>13 depending upon the verdict. I think that would have to be</p> <p>14 hashed out with the district court.</p> <p>15 JUSTICE AMON: I'm sorry, you probably want to</p> <p>16 answer that.</p> <p>17 MR. YODER: I apologize. So the point is this:</p> <p>18 There was an obligation under 6.2. We don't deny that.</p> <p>19 There was an obligation to supply the memory chips in</p> <p>20 connection with the joint development project.</p> <p>21 There was an obligation to supply it during the</p> <p>22 development stage so they had access to those chips and if</p> <p>23 the project were successful and the NVDIMM-P product were</p> <p>24 commercialized, there would be an obligation to supply</p> <p>25 those memory chips to Netlist, in order for Netlist to</p> <p style="text-align: right;">Page 7</p>	<p>1 okay?</p> <p>2 MR. YODER: Sure.</p> <p>3 JUSTICE SMITH: Let's say that I, after looking</p> <p>4 at the contract as a whole, that I conclude that</p> <p>5 Section 6.2 is ambiguous. Now, that's contrary to what</p> <p>6 both parties say, but I do say it, that's it, that's</p> <p>7 arguendo that's what it is.</p> <p>8 What do you do with that? If it's ambiguous, how</p> <p>9 does that affect your case?</p> <p>10 MR. YODER: Well, if it's ambiguous, then under</p> <p>11 New York law you have to look to the extrinsic evidence to</p> <p>12 determine what the parties' intent was, and the parties'</p> <p>13 intent is the controlling issue there.</p> <p>14 And in this case, the most compelling extrinsic</p> <p>15 evidence is the MOU, the memorandum of understanding of</p> <p>16 the parties, which followed the exchange of two term</p> <p>17 sheets, which made clear that the memory chips were to be</p> <p>18 raw material as part of the joint development project.</p> <p>19 And Netlist's CEO, Mr. Hong, admitted in his</p> <p>20 deposition that under those term sheets, the raw materials</p> <p>21 were for the NVDIMM-P product.</p> <p>22 JUSTICE SMITH: You're making the point you have</p> <p>23 to go outside the contract.</p> <p>24 MR. YODER: Right.</p> <p>25 JUSTICE SMITH: So you have to go back for a</p> <p style="text-align: right;">Page 9</p>

<p>1 MR. YODER: Yeah, and so but that also goes to 2 materiality. One, it goes to whether there's a breach; it 3 also goes to whether it's material. 4 Did Netlist really believe it was material when 5 they sat on it for five years and didn't declare a breach? 6 And when finally the higher Korean tax authority 7 overruled the lower Korean tax authority, was there a 8 breach when the lower Korean tax authority agreed with 9 Samsung? It's nonsense. It can't be. 10 But when the higher authority decides there's a 11 refund, with interest, there's nothing to cure; but yet 12 under the district court's interpretation, Samsung's out 13 of luck. Never could have cured, never given a chance to 14 cure, but there's this strict liability based upon what is 15 determined five years later. 16 So not a breach, but also that should have gone 17 to the jury on materiality. 18 JUSTICE SMITH: Well, I gather from Samsung's 19 perspective, if there's ambiguity and if Section 6.2 is 20 interpreted the way you think it should, considering the 21 totality of the circumstances, the tax gets reversed as 22 well because there's no ambiguity there, it's not strict 23 liability and the declaratory relief gets overturned 24 because the others didn't happen. Is that correct? 25 MR. YODER: Right. That's our position,</p> <p style="text-align: right;">Page 14</p>	<p>1 JUSTICE SMITH: Do you want to save -- I thought 2 you said you want to say five minutes. 3 It's up to you entirely, of course. 4 MR. YODER: No, and I am watching the clock, 5 Your Honor, because I got a sense we need to do that. 6 But the thing I would say, though, just on the 7 materiality, is that when you look at the record before 8 Judge Scarsi on the 6.2 issue in materiality, Netlist's 9 argument was that the supply obligation was the primary 10 benefit that it received, and Judge Scarsi agreed with 11 that. He said this was integral, this was a key 12 component, and he made a factual finding based upon 13 essentially a post hoc declaration by Netlist's CEO, and 14 he disregarded all the other evidence in the record as to 15 whether this was the primary benefit. 16 JUSTICE AMON: So it wasn't an undisputed fact? 17 MR. YODER: Pardon? 18 JUSTICE AMON: It wasn't an undisputed fact, 19 then? In other words, the fact. 20 MR. YODER: It was disputed. It was disputed. 21 JUSTICE AMON: The fact was disputed? 22 MR. YODER: Very much disputed, yeah, whether -- 23 JUSTICE DESAI: He shouldn't have resolved it 24 against you because it was disputed? 25 MR. YODER: Yeah, absolutely not. I mean, even</p> <p style="text-align: right;">Page 16</p>
<p>1 Your Honor. But even if the court doesn't agree that that 2 should be the outcome, there needs to be a remand and a 3 trial on these issues for sure. 4 And that's true as to materiality on 6.2 as well, 5 and where I was going with that, when you go through the 6 briefing on the issue of materiality, Netlist's argument 7 was really, it was material because the supply obligation 8 was a primary consideration for getting these licenses. 9 Well, number one, if you look at the JDLA and you 10 look at the recitals, the recitals are very clear -- and 11 parties put recitals in agreements to make sure language 12 isn't tortured down the road by lawyers and courts, right? 13 Here's what our purpose is, interpret this 14 agreement consistent with our purpose. 15 And when you look at the recitals, what does it 16 say about the licenses? 17 Whereas in connection with their collaboration 18 hereunder, the parties wish to grant to each other a 19 cross-license under each party's patents. 20 The licenses are being given in connection with 21 the collaboration. That's the joint development project. 22 And Netlist got a whole bunch of consideration in 23 addition to this supply obligation. 24 If there were an unlimited supply obligation, it 25 would be called out in some fashion.</p> <p style="text-align: right;">Page 15</p>	<p>1 just on his -- and he erred as a matter of law too, 2 because instead of applying the multifactor test of 3 materiality, he just picked out this one issue. 4 And even on that issue, there was a conflict in 5 the facts in the record. 6 JUSTICE AMON: Can I just ask you one further 7 question? You said that you did supply these memory 8 components in connection with the JDP, what was being 9 developed? 10 MR. YODER: Yes, Your Honor. 11 JUSTICE AMON: Why was there a need to do that? 12 MR. YODER: To create the product. 13 JUSTICE AMON: So there was some -- 14 MR. YODER: To try to -- 15 JUSTICE AMON: And did you also, during that 16 time -- is the record clear that you submitted memory 17 components for Netlist's other uses? 18 MR. YODER: Yes, there was, but that was true 19 before, during and after, and it was done subject to 20 purchase orders and acknowledgements that didn't reference 21 the JDLA. So the parties' practice continued the same way 22 during the JDLA as before, and our position is that 23 doesn't really prove anything. 24 You really have to get into the extrinsic 25 evidence to decide why are they doing that?</p> <p style="text-align: right;">Page 17</p>

<p>1 component parts was because there was a JDP, right?</p> <p>2 MR. YODER: Correct. Correct.</p> <p>3 But the purchase of the components for resale,</p> <p>4 the purchase of the NAND and the DRAM to sell to third</p> <p>5 parties was outside of the joint development agreement.</p> <p>6 The SEC filings that Netlist made where they say</p> <p>7 we have no long-term supply agreement shows that; the fact</p> <p>8 that Netlist kept coming back to Samsung saying, give us a</p> <p>9 unlimited supply agreement, shows that. All of that shows</p> <p>10 that.</p> <p>11 The thing I would say on materiality real quickly</p> <p>12 is that the evidence was before the court, and if the</p> <p>13 evidence showed that the parties did not intend a</p> <p>14 supply -- an unlimited supply obligation to be the primary</p> <p>15 consideration for these licenses, then even more so it</p> <p>16 wasn't material, it wasn't a material breach.</p> <p>17 And all of that evidence was before the district</p> <p>18 judge. If you look at his ruling that he made in</p> <p>19 connection with the summary judgment decision, he said</p> <p>20 that -- and bear with me, I know I'm a little bit over.</p> <p>21 It's the last point that I'll make.</p> <p>22 Netlist, in its reply, acknowledges that there's</p> <p>23 a fact issue on materiality.</p> <p>24 Netlist said that if Samsung was suggesting that</p> <p>25 there's a fact issue on materiality, there isn't. Look at</p> <p style="text-align: right;">Page 38</p>	<p>1 of which is damages; the others are contract, Netlist</p> <p>2 performance, Samsung's breach.</p> <p>3 But what the district court did when he said,</p> <p>4 here's my ruling on summary judgment, it was as to three</p> <p>5 elements. It wasn't as to liability as a whole, it was</p> <p>6 existence of contract, performance of contract, and</p> <p>7 Samsung's breach of the supply provision. That's 1ER41.</p> <p>8 And in response to a summary judgment motion that</p> <p>9 identifies three elements and says we want summary</p> <p>10 judgment on those, I don't believe that Rule 56 requires a</p> <p>11 defendant to put in affirmative defenses.</p> <p>12 JUSTICE SMITH: Okay.</p> <p>13 MR. YODER: Thank you so much.</p> <p>14 JUSTICE SMITH: Any other questions by my</p> <p>15 colleagues? Thanks to counsel.</p> <p>16 MR. YODER: Thank you.</p> <p>17 JUSTICE SMITH: This is an interesting case. We</p> <p>18 appreciate the preparation on your argument.</p> <p>19 The case just argued is submitted, and I'm</p> <p>20 pleased to say that the court is adjourned for the week.</p> <p>21 THE BAILIFF: All rise.</p> <p>22 Court for this session stands adjourned.</p> <p>23 (End of recording.)</p> <p>24</p> <p>25</p> <p style="text-align: right;">Page 40</p>
<p>1 this extrinsic evidence.</p> <p>2 The district court looked at extrinsic evidence</p> <p>3 on materiality. It relied on Mr. Hong's self-serving</p> <p>4 declaration. It ignored all the other evidence in the</p> <p>5 record about the three-year delay in claiming a breach,</p> <p>6 about the statements that were made to the SEC -- all of</p> <p>7 which, we submit, show that this wasn't material.</p> <p>8 Final point is that if there is to be a remand,</p> <p>9 we would ask the court to consider allowing Samsung to</p> <p>10 raise its affirmative defenses; that those weren't</p> <p>11 required to be raised as part of the summary judgment, and</p> <p>12 I would just point the court to --</p> <p>13 JUSTICE AMON: Isn't that too little, too late?</p> <p>14 I mean, you should have raised those in</p> <p>15 connection with summary judgment and you didn't do it.</p> <p>16 MR. YODER: May I answer that question?</p> <p>17 JUSTICE SMITH: Yes.</p> <p>18 MR. YODER: Okay. And I'll be brief.</p> <p>19 No. If you look at -- the best thing to look at,</p> <p>20 Your Honor, is the district court's order on summary</p> <p>21 judgment. There was a lot of confusion about what the</p> <p>22 motion was.</p> <p>23 The notice of motion said the merits of our</p> <p>24 claims. I don't know what that is. Their points and</p> <p>25 authorities talk about the four elements in New York, one</p> <p style="text-align: right;">Page 39</p>	<p>1 C E R T I F I C A T E</p> <p>2</p> <p>3</p> <p>4 I, TERRI NESTORE, Certified Shorthand Reporter/</p> <p>5 Transcriptionist, do hereby certify that I was authorized</p> <p>6 to transcribe the foregoing recorded proceeding, and that</p> <p>7 the transcript is a true and accurate transcription of my</p> <p>8 shorthand notes, to the best of my ability, taken while</p> <p>9 listening to the provided recording.</p> <p>10</p> <p>11 I further certify that I am not of counsel or</p> <p>12 attorney for either or any of the parties to said</p> <p>13 proceedings, nor in any way interested in the events of</p> <p>14 this cause, and that I am not related to any of the</p> <p>15 parties thereto.</p> <p>16</p> <p>17</p> <p>18 Dated this 22nd day of October, 2023.</p> <p>19</p> <p>20</p> <p>21  TERRI NESTORE, CSR 5614, RPR, CRR</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: right;">Page 41</p>